1953

Brandtjen & Kluge, Inc. v. C. Jean Shonka & Anna E. Erickson : Brief of Appellant

Utah Supreme Court

Walter G. Mann; Thomas J. Stearns; Attorneys for Appellant;

No. 8112

In The Supreme Court of the State of Utah

BRANDTJEN & KLUGE, INC.,
a corporation of the State of Minnesota.
Plaintiff & Appellant

vs.

C. JEAN SHONKA & ANNA E. ERICKSON
dba Acme Multigraph Co.,
Brigham City, Utah.
Defendants & Respondents

No. 8112

APPELLANT'S BRIEF

Appeal from the District Court of Box Elder County, Utah
Honorable Lewis Jones, District Judge

Walter G. Mann and
Thomas J. Stearns
Attorneys for Appellant

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STATEMENT OF FACTS

On the 18th day of October, 1951, after some preliminary meetings, a contract was entered into by and between Brandtjen & Kluge Inc., the plaintiff, and the Acme Multigraph Co., by Anna E. Erickson and C. Jean Shonka copartners, the defendants, (Ex. P-1) for the sale and purchase of one 12 x 18 new Kluge Platen Press 6 roller for a total consideration on time of $2217.95. This contract provided that it should not become final until accepted by the plaintiff. It was accepted on the 25th day of October, 1951. It provided that a note for the installment payments as set out in the original contract shall be executed thereafter and that said note would be secured by a Conditional Sales Contract. It provided that a competent man to install said equipment would be furnished by Vendor and his expense while so engaged to be borne by the seller. The contract provided that the press included the equipment as listed on the back of the contract. On the back of the contract under the heading "Standard Equipment with new Kluge Automa-

tic Platen Press" were listed various items of equipment and then there was an askerisk sign showing whether or not they were included and two of these notations are as follows:

"*One set cast rollers, no charge—for erector's convenience.

*Not included as standard equipment with open press."

An open press is a press that is hand-fed and an automatic press being one that is automatically fed with additional equipment and machinery that requires considerable adjusting, while the open press is shipped all assembled. The record bears out that they fully understood that they were buying an open press.

The description of the machine "6 roller" referred to its construction since plaintiff manufactures both the six roller and the four roller press for the commercial market. These rollers were detachable parts composed of a roller core about which a casting material of the nature of rubber, or synthetic rubber, was expected to be applied to form the cast roller.

Some time after the original contract was entered into and prior to any delivery being made, a letter of acknowledgment of receipt of said contract was sent to the defendants (Ex. D-5) with a notation that there was no representation made as to the date of delivery.

While the original order provided that plaintiff would install the press, the salesman who had sold the same, a Mr. G. H. Raymond, had some correspondence with the defendants (Ex. D-6) and following this correspondence on November 16, 1951, the defendants sent to the plaintiff (Ex. P-2) a letter waiving the installation of said machine at the expense of the seller. On the 27th day of November, 1951, a Conditional Sales Contract was made up pursuant to the

original agreement of the 18th day of October, 1951. In said Conditional Sales Contract the 12 x 18 Kluge Platen Press was listed "with 6 rollers" instead of "6 roller' as the original contract provided for (Ex. P-3). A note for the balance remaining due after the down payment (Ex. P-4) was sent at the same time and all were executed by the defendants. Under the note and Conditional Sales Contract, monthly payments were to be made beginning with the 27th day of December, 1951, in the amount of $59.42.

The machine was delivered to the defendants at Brigham City, Utah, by railroad shipment, it having been bought F.O.B. St. Paul, and the defendants paid the shipping charges in the amount of $157.28. It arrived at its destination on or about the 6th day of December, 1951. It was crated and was moved by a drayage firm inside of the place of business of the defendants and remained crated for some time thereafter. The first installment payment became due on the contract on December 27, 1951, in the amount of $59.42 and was paid,, but installments No. 2, 3 and 4 became delinquent and were not paid. Just before the installment No. 3 was due a letter dated the 22nd of February was sent by the defendants (Ex. -D-13) to Mr. Raymond and he was asked when he would install the said equipment. A carbon copy of said letter was sent to the plaintiff and a postcript asked for an extension of time for making the monthly payments. On March 19, 1952, (Ex. D-14) the defendants wrote to the plaintiff saying that the letter written to Mr. Rayment had been returned unclaimed. They advised that the machine had not been installed and said that no additional payments would be made until it was, and further advising that if Mr. Raymond was not authorized to install, that a man would have to be sent from the company for said purpose and at this time demanded,

besides installing the machine, that a man also give them instructions in the operation of the machine (Ex. D-14). Under date of March 29, 1952, (Ex. P-15) Omer J. Call, attorney for defendants, advised plaintiff that defendants were negotiating with another firm for a machine to do the work of the one that they had purchased from plaintiff and advised them that if arrangements were made for the immediate installation by one of the company's erectors or agents and "the training promised" was furnished, that the defendants would waive the purported breach and bring payments on the contract up to date.

As a consequence on the 5th day of April, 1952 (R. 125) Mr. Raymond the salesman called at the place of business of the defendants and spent two days assembling said machine (R. 126) and completely installed said machine with the exception of making the electrical connections (the original contract provided that the electrical connections would be done at the expense of the defendants) and placed the roller cores upon the machine. According to their own witness, Claybaugh (R. 194) with the exception that the roller cores were not cast, which would cost $26.00 and the electrical connections made, the machine was then ready to operate (R. 189).

On May 9, 1952, the defendants signed an agreement for the purchase of a used machine (Ex. D-19) for $600.00. Just how long the negotiations had been going on for the purchase of the machine, cannot be determined from the record. Judge Jones says (R. 236):

> " . . . . I want to further state in the record, the reason the court only allows $1.00 is because within a few days or so from the time that the contract became rescinded or in the state to be rescinded, your clients Mr. Call, began flirting with another company for the installation of another machine. It's just nip and tuck as to

whether your clients were negotiating with another company before the mechanic got there to install the first machine or not. So on that theory I hold the damages to $1.00 . . . ."

On April 22, 1952, the defendants finally demanded a complete rescission of the contract, alleging as a breach, that there were no cast rollers with plaintiff's press and no installation. Defendants' witness testified that there was a roller company in Salt Lake City where defendants could have had the rollers cast for as little as $26.00 for all six and also testified that the machine could have been operated if they had the rollers cast and the electrical connections made.

At the time of rescission, payments 2, 3 and 4 were considerably delinquent. The defendants still had the machine in their possession; refused to give it up and as a consequence plaintiff initiated suit to reposses the property under the express terms of the Conditional Sales Contract. In answer, the defendants alleged the original sales contract as their defense and counterclaim for rescission. Such contract being incorporated into the allegations of third defense No. 1 and first cause of action for counterclaim No. 1. No modification of this contract was ever plead as a basis for any claim and no amendment to the proceedings was ever made to encompass such a modification.

Consequently the allegation before the court is: The machine was sold under a contract of October 18, 1951, which provided for no cast rollers and the machine was installed by the company's man without cast rollers as provided in said original contract.

STATEMENT OF POINTS:

POINT I: THAT THE COURT ERRED IN GRANTING JUDGMENT FOR THE FREIGHT PAID BY THE DEFENDANTS AS FOUND BY FINDING OF FACT NO.

5, AND GRANTING DAMAGE FOR SAID AMOUNT IN ADDITION TO A RESCISSION OF THE CONTRACT, AS SAID AMOUNT WAS PAID TO A THIRD PARTY AND ANY JUDGMENT INCLUDING AN ITEM FOR FREIGHT PAID WOULD BE A JUDGMENT FOR DAMAGES IN ADDITION TO RESCISSION.

POINT 2: THE RESPONSIBILITY OF PLAINTIFF UNDER THE ORIGINAL CONTRACT AND HIS OBLIGATION TO DELIVER CERTAIN EQUIPMENT WITH THE SALE OF SAID PRESS CANNOT BE ENLARGED BY A SUBSEQUENT CONDITIONAL SALES CONTRACT EXECUTED PURSUANT TO SAID ORIGINAL CONTRACT AND WHICH CONTAINED A TYPOGRAPHICAL ERROR SO AS TO MIS-DESCRIBE THE EQUIPMENT SET OUT IN THE ORIGINAL CONTRACT. THE ORIGINAL CONTRACT, PROMISSORY NOTE AND CONDITIONAL SALES CONTRACT SHOULD BE CONSTRUED TOGETHER.

POINT 3: DEFENDANTS' WAIVED INSTALLATION OF THE PRESS.

POINT 4: THAT THAT PART OF FINDING OF FACT NO. 3 ALLEGING:

"That by the terms of said agreement plaintiff became obligated to defendants to furnish one 12 x 18 Kluge Platen Press together with all standard equipment and with six rollers therefor, and to install said machine for defendants at their office in Brigham City, Utah." IS CONTRARY TO SAID AGREEMENT AND THE EVIDENCE BEORE THE COURT.

POINT NO. 5: THAT FINDING OF FACT NO. 4 AND PARTICULARLY THAT PART:

"That there was not delivered with said machine six rollers called for by the contract."

IS CONTRARY TO THE EVIDENCE AND SAID CONTRACT AND THAT PART OF SAID FINDING OF FACT TO-WIT: "AND SAID MACHINE WAS NOT INSTALLED" IS CONTRARY TO THE EVIDENCE.

POINT 6: A BREACH, IF ANY WAS COMMITTED BY PLAINTIFF, WAS SLIGHT. EQUITY SHOULD THEREFORE DENY RESCISSION.

POINT 7: THAT THE COURT ERRED IN NOT FINDING IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS.

ARGUMENT

PIONT No. 1: That the court erred in granting judgment for the freight paid by the defendants, as found by finding of fact No. 5, and granting damage for said amount in addition to a rescission of the contract, as said amount was paid to a third party and any judgment including an item for freight paid would be a judgment for damages in addition to rescission.

We find in California Jurisprudence Vol. 6 page 388 Art. 233, the following:

> "Results of election to rescind: Upon the breach of a contract a party thereto may treat it as rescinded, and if he has advanced money on it, bring an action for its hecovery; or he may treat the contract as still in force and maintain an action for damages for the breach, but he cannot pursue both courses. (Lemle vs. Barry 181 Cal. 1, 183 Pac. 150: House vs. Piercy, 181 Cal. 247, 183 Pac. 807). If the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by breach of the covenants."

Again in American Jurisprudence Vol. 12, page 1038, Article 455, under the title. "Effect of Rescission," we have:

"Generally speaking, the effect of rescission is to extinguish the contract. The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. Accordingly, it has been said that a lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of contract. (There are then cited numerous cases in support of this contention under footnote 14.) The effect of rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract. An election to rescind a contract waives the right to sue upon it. After a rescission for a breach, an action cannot be maintained on the contract for such braech. After rescission for a breach, there is no right to damages for such breach."

This question is elementary and is followed by so many different texts, that the writer will not pursue it further except to go back and show what the court did in respect to this. In the record (R-156) we have the following:

"Q. I have a question that isn't proper redirect. Do you know whether or not anything was paid to the Union Pacific Railroad for freight?

A. Yes, sir.

Q. For bringing this machine?

A. Yes, sir.

MR. MANN: I object to it as incompetent, irrevelant, and immaterial, as the contract itself shows that it was sold f.o.b. back there. Even if they rescinded it, it was still sold f.o.b. back there and wouldn't have any bearing whether the freight was paid by them or not, because all the negotiations were f.o.b.

MR. CALL: I agree as to the rescission, but that is an element of damages under the first cause of this action for counterclaim.

THE COURT: The objection is overruled. You may answer.

Q. Do you know what the amount was?

A. As I remember, it was around a hundred fifty three dollars or fifty seven dollars, some such amount.

THE COURT: Have you added it up? How much is it?

MR. CALL: $157.28.
THE COURT: All right.

Now even though counsel for the defendants admitted that it would not apply if a rescission were granted, and that he was offering it as a damage item, the court in granting the defendants a Decision, said (R-234:)

> THE COURT: While I'm thinking about it, in the case of Brandtjen and Kluge vs. C. Jean Shonka and Anna Erickson, finding and conclusions and judgment may be entered in favor of the defendants and against the plaintiff for the down payment of $400, and some dollars, and the freight charges of a hundred fifty dollars, plus $1.00 damages. The court finds that this Kluge roller press with six rollers means six rollers, and the court finds that there was a duty on the part of Brandtjen-Kluge to install the printing press. I want to further state in the record, the reason the court only allows $1.00 is because within a few days or so from the time that the contract became rescinded or in the state to be rescinded, your clients, Mr. Call, began flirting with another company for the installation of another machine. It's just nip and tuck as to whether your clients were negotiating with another company before the mechanic got there to install the first machine or not. So on the theory I hold the damages to $1.00. However, Mr. Call, you prepare the findings and judgment. $1.00 damages, the down payment back, plus the freight charges, and both sides can appeal.
>
> MR. CALL: On the damages, I take it if we are entitled to rescind we won't be entitled to damages.
>
> THE COURT: You want to waive that?
>
> MR. CALL: We have no objection to it.
>
> THE COURT: All right"

We have this situation. That counsel for the defendants fully understood the law and knew that he could defend by asking damages, which means that the contract is still in full force and effect, so he sets up his first counterclaim to that effect and asks for lamages which include the freight that he has paid. On his second counterclaim he asks for a rescission which means to terminate the con-

tract and asks that the money that his clients have paid to the company be returned. He understands it in court and when testimony is offered regarding freight he again tells the court it is on the damage side of his counterclaim and that it wouldn't apply to a rescission, but the court is bound to give it to him so refuses to call it damages in its oral decision and refers to it as freight charges. The court then goes on and tries to give an extra dollar damage but ocunsel for the defendants asked that it be waived on the ground that he could not rescind and also receive damage. Consequently any judgement ordered by the court which would include an item of freight paid to third parties, is in fact, an attempt by the court to grant damages on the strength of the contract and then in the same breath rescind the contract and direct a judgment for the return of the down payment. The court erred in this respect.

POINT No. 2: That the responsibility of plaintiff under the original contract and his obligation to deliver certain equipment with the sale of said press cannot be enlarged by a subsequent conditional sales contract executed pursuant to said original contract and which contained a typographical error so as to mis-describe the equipment set out in the original contract. The original contract, promissory note and conditional sales contract should be construed together.

Three written documents originated the rights of the parties in the instant case. These were the original sale contract, the promissory note, and the conditional sale contract. Being part of the same transaction and executed in connection with the same subject matter, they should be construed together to further the purpose of their terms. Wm. Lindeke Land Co. vs. Kalman, 1934 — Minn ___, 252, N.W. 650, 652, 653:

"(c) Separate writings as part of the same transaction must be construed together. 13 Corpus Juris, Art. 487, p. 528 says: 'Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other. **So if two or more agreements are executed at different times as parts of the same transaction they will be taken and construed together." (dark print added)**

Similarly, see: Nau vs. Vulcan Rail & Construction Co., 1941 286 N.Y. 188, 36 N.E. 2d 106, in which the court was required to ascertain whether an "interference suit" in the United States Patent Office was included within the context of the term "infringement suit," as used in the contract between the parties. Three agreements were entered during the course of the relationship of the parties. They were all connected with the furtherance of the sale "turnstiles" being produced by defendant, so the court examined them all rather than just one (N.Y. 197, N.E. 2d 110):

"The contract between the defendant and the city of New York was referred to in defendant's acceptance of plaintiff's offer and substantially made a part thereof, and the last writing referred to and substantially made the acceptance a part of it. **All three instruments were executed at substantially the same time, related to the same subject-matter, were cotnemporaneous writings and must be read together as one (authority cited). Even though they had been made at different dates that fact would not affect the rule since they were to effectuate the same purpose and formed a part of the same transaction." (Dark print added)**

In accord: Paine-Gallucci Inc. vs. Anderson, 1952,— Wash—, 246 Pac 2d 1095, 1097; and 77 C.J.S., Sales, Section 71, p. 734.

In taking cognizance of the rule also, Williston has emphasized that the direct reference to the related writings, as appears in some cases, is not essential. It is sufficient that they are connected with the same transaction. III

Williston on Contracts (Rev. ed), Section 628, p. 1801. Interpretation of Several Connected Writings:

> "Where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing . . . . Even where a writing does not refer to another writing, if such other writing was made as part of the same transaction, the two should be interpreted together."

The rule is purely one pertaining to the construction of writings and is not affected by the merger of the particular instruments into a later one. See Fleisher Engineering & Construction Co. vs. Winston Bros. Co., 1950, — Minn. —, 42 N.W. 2d 396. As demonstrated in the various decisions it has a dual purpose. Besides aiding the interpretation of the terms and furthering their intent, it lends effect to as much of the contract of the parties as is possible. Retta Sterling vs. The Head Camp, 1905, 28 Utah 526, 80 Pac. 1110. There, the court considered three separate writings in determining the contract of the plaintiff and defendant: a death benefit certificate; the by-laws of defendant organization; and the Constitution of defendant organization. In its terms, the benefit certificate refered to the other instuments, so the court held (Utah 538):

> "The rule is elementary that where, as in this case, a contract consists of several different instruments, each document will be read and construed with reference to the other, and, that the contract as a whole will, if possible, be given effect."

The demurrer to the complaint was sustained, decedent not having been bound in agreement with defendent.

The principal pervading this method of construction which deals with separate writings is the same as that pertinent to a single contract. **A construction that reconciles the terms of the agreements or agreement is preferable to one that neutralizes them.** Vitagraph Inc. vs. American Theatre Co., 1930, 77 Utah 71, 291 Pac. 303. In that case

the court construed the meaning of an assignment of a contract (lease of film) to determine whether the contract was modified by it. Defendant insisted that it became a guarantor rather than a principal. In concluding that such a modification had not occurred, the court followed 6 R.C.L., Section 227, pp. 837, 838, at (Utah 79, Pac. 306):

> **"Seeming contradictions must be harmonized 'if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and if possible effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible to another which gives effect to all of its provisions." (Dark print added.)**

One of the main bases for a rescission on which defendants have relied is that there was a breach of contract, because plaintiff failed to include "cast" rollers with the purchase. Defendants have insisted such "cast" rollers were required by the general description of the press in the conditional sales contract as "1 12 x 18 Kluge Platen Press with 6 rollers and all standard equipment." Althogh their construction of that agreement is repugnant to the terms of the original contract of October 18, 1951. Defendants are unable to explain their position by any more specific proviso in the conditional sales contract.

On the other hand, if the conditional sale contract is read in conjunction with the original contract rather than segregated, a contrary conclusion is readily apparent. Under both agreements only "standard equipment" was to accompany the purchase. The conditional sale contract does not purport to list that equipment. However, the original order did list it in detail, and in so doing, specificallp excluded "cast" rollers from being such standard equipment with the Open Press. Therefore, in ascertaining

the meaning of the term and what it comprehended in the conditional sale contract, it would seem only reasonable to rely on the agreement of the parties to which the reference was made. Usually, the special provision of a contract control the general, 12 Amer. Juris., Contracts, Section 244, p. 779, and the specific designation of the subject matter of a sale cannot be enlarged by construction. 77 C.J.S., Sales, Section 74a., p 737, so the conclusion would be that under both agreements, defendants would purchase the same thing: a six roller platen press without cast rollers.

Assuming that there was doubt as to the meaning of the description of the machine in the conditional sale contract as a "Kluge Platen Press with six rollers and all standard equipment," defendants have stated that the contract should be construed to the disadvantage of the party who drafted it, relying on American Jurisprudence for the rule. The Utah Court however, has deemed that method of construction ordinarily objectionoble. Caine vs. Hagenberth 1910, 37 Utah 69, 106, Pac. 945, at (Utah 94, Pac. 953):

> **"This rule is not favored by the courts, and will only be invoked in extreme cases and as a last resort.** Besides it is, as a general thing, invoked only in deeds poll, in insurance contracts, in contracts to avoid forfeitures, and in contracts that are not favored by law . . . **Contracts, therefore, in which the parties thereto make mutual promises do not ordinarily come within this rule." (Dark print added)**

Instead of such an extreme measure, the proper rule would be in the nature of those repeatedly mentioned in the cases. First, the writings composing the entire transaction of the sale: the original contract, the promissory note, and the conditional sale contract, should be reviewed to decide what the terms mean. Then, as much of the prior contract should be enforced as is possible within the purview

of that agreement. Finally, wherever possible the agreements should be reconciled. The result in the present case would be for a "Kluge Platen Press 6 Roller" as described in the original agreement to be a press of six roller type without the casting as they were specifically excluded from the standard equipment.

POINT No. 3: Defendants Waived Installation of the Press.

The original contract of October 18, 1951, (Ex. P-1) contained this clause:

> "A competent man to install said equipment, to be furnished by vendor, his expenses, while so engaged, to be borne by the seller."

On November 16, 1951, after the original contract had been accepted by the Home Office on October 25, 1951, the defendants, after some correspondence with the agent that had sold the machine, sent to the plaintiff a letter (Ex. P-2) which reads as follows:

> "This letter is to release you from that portion of the contract we signed that states: 'a competent man to install said equipment to be furnished by Vendor, his expenses, while so engaged, to be borne by the seller!" "Mr. Raymond has consented to assist us in our initial training inasmuch as we have had no letter press experience whatever. We know absolutely nothing about the press in general or its function."

Even though they gave that release, they made another demand upon the plaintiff (Ex. D. 14) on March 19, 1952, that the plaintiff send a man to install the machine, and even though they had once waived this requirement they set up in their pleadings that they had the right to rescind because the machine was not installed. Yet the record shows (R. 149) that within two weeks after the letter of March 19, or thereabouts to-wit April 5, Mr. Raymond came to the property of the defendants and installed the machine with the exception of the electrical connection and cast rollers, which were not a part of the original contract.

Defendants have insisted that a waiver must be supported by consideration. Notwithstanding that they may or may not be correct in regard to a modification or change, the same rule does not prevail when a party waives, releases, excuses, or dispenses with the performance of a condition in a substituting agreement. No consideration is then required. Stubbs vs. Philadelphia Life Insurance Co., 1929, — So. Car.—, 149 S.E. 2 (question of the waiver of nonpayment of an insurance premium by retention of the premium note) at (S.E. 11):

> "Waiver, as has been often defined, is the voluntary relinquishment of a known right — **that is, that it needs no consideration moving between the parties; it is unilateral** and depends entirely upon conduct of the company; what it did and what it said was not only material but vital, for in no other way could its purpose and intentions be disclosed." (Dark print added)

In accord: Clark vs. Dye, 1924, — Minn —, 197 N. W. 209, 212:

> "A waiver, therefore being merely a voluntary relin- cannot be regarded as a contract, and does not require a consideration to support it."

In accord: Schwart et al vs. Wilmer, — Md. —, 44 A. 1059, 1061:

> "A waicer, therefore, being merely a voluntary relinquishment of a right, cannot be regarded as a contract, and does not require a new consideration to support it."

In accord: Champion Spark Plug Co., vs. Automobile Sundries, 1921, C.C.A., 2d, 273 Fed. 74, 79; Bank of American National Trust & Savings Ass'n vs. Maryland Casualty Co., 1941, D. C., N. D., Ca., 3D, 37 Fed Supp 677, 683, 684; Mahaska County State Bank vs. Coist et al, 1893, — Ia. —, 54 N.W. 450, 453; and Smith vs. Coutant, 1942,— Ia —, 6 N.W. 2d, 421, 426.

The basis for sustaining the validity of a waiver seems to be a practical one. 2. Herman on Estroppel, Section 1020, P. 1149:

"No one who waives or dispenses with the performance of a contract can rely upon the failure to perform it, either as a defense or a cause of action, for no one can complain of a default which he has caused or sanctioned." (Dark print added)

Like the other authority, the Utah court has also held a waiver of a condition in a contract binding. Crescent Mining Company vs. Wasatch Mining Company, 1888, 5 Utah 624, 634, 19 Pac. 198, 203:

"A party to a contract may always dispense with the performance of a condition in his favor, and when this is done it is the same as though the thing dispensed with had been done.' (Underlining added)

Similarly, see: Ryan vs. Curlew Irrigation & Reservoir Company, 1909, 36 Utah 382, 104 Pac. 218, where the court again deemed the waiver of a clause in a contract irrevocable (Utah 389, 104 Pac. 220):

"It seems to us that under the undisputed evidence no other legal inference is permissible than that both parties waived the so-called referee clause as if by mutual consent. If, therefore, the clause was ignored at a time when it might have been of some use to the parties, it would be an injustice, if not a fraud to now enforce it as against one and in favor of the other. Courts should not enforce what the parties themselves have by mutual consent waived." (Dark print added)

POINT NO. 4: That that part of finding of fact No. 3 alleging:

"That by the terms of said agreement plaintiff became obligated to defendants to furnish one 12 x 18 Kluge Platen Press together with all standard equipment and with six rollers therefor, and to install said machine for defendants at their office in Brigham City, Utah."

is contrary to said agreement and the evidence before the court.

POINT NO. 5: That finding of fact No. 4 and particularly that part:

"That there was not delivered with said machine six rollers called for by the contract."

is contray to the evidence and said contact and that part of said finding of fact to-wit: "And said machine was not installed" is contrary to the evidence.

Inasmuch as point No. 4 and point No. 5 are related in subject matter and can be treated together, they are treated hereafter as follows:

Both plaintiff and defendant plead that the original contract was entered into on the 18th day of October, 1951, and accepted by the plaintiff on the 25th day of October, 1951. The contract is set out in the pleadings and is Ex P.1.

This contract is complete and became binding when accepted by plaintiff and carried a clause within which reads:

> "This contract shall not be binding on Brandtjen & Kluge Inc., until its written acceptance is endorsed by the home office."

The contract also provided:

> "That no agreements or representations expressed or implied not specified in the warranties on the reverse side hereof respecting this contract or the goods hereby ordered have been made by said vendor unless contained herein, and this contract constitutes the entire agreement of the parties."

The contract also provided that a note for the balance of the purchase price to be secured by a conditional sales contract would be entered into payable in 30 monthly installments the first installment to be due 30 days after shipment. In other words the note and the conditional sales contract could not be determined until the actual shipping had taken place and the beginning date fixed. The exact date was the only item that had not been determined by the contract and it had been agreed there, that the shipping date would fix that.

The contract further provided that:

> "A competent man to install said equipment to be furnished by vendor, his expenses, while so engaged, to be borne by the seller."

The contract described the press that was being sold as:

"One 12 x 18 New Kluge Platen Press, 6 roller, including equipment as listed on back hereof including the guarantee and warranty there set forth."

On the back of the contract is a heading listing the standard equipment with the automatic press with an asterisk noting that with the open press the items so marked were not included, such as:

* 1 set cast rollers. No charge - - for erector's convenience.
* NOT included as standard equipment with Open Press.

That they fully understood that they were buying an open press which would not include the rollers is brought out in the cross examination of defendant, Jean Shonka. (R.116)

Q. I show you plaintiff's exhibit one. Where is it that it says on there that there will be delivered six rollers with that machine?
A. Just the impression on it, twelve by eighteen Kluge platen press, six roller.
Q. It doesn't say "with six rollers", does it?
A. Not on this contract, no.
Q. And that was your original contract; isn't that correct?
A. This is, yes.
Q. And that's the one you were cross examined on by Mr. Call?
A. Yes', sir.
Q. And there is no place in it where it says "with six rollers?"

MR. CALL: Well, I'll stipulate - if you'll rely on that contract, I'll stipulate we didn't.

MR. MANN: The contract speaks for itself. I don't need to stipulate.

MR. CALL: Okeh.

A. No, sir.
Q. Calling your attention to where it speaks of a twelve by eighteen new Kluge platen press, six roller, there is a notation underneath, "including equipment as listed on back hereof including the warranty as set forth."

MR.CALL: I object to this as improper cross examination.

THE COURT: Overruled.

Q. On the back of this contract there is another notation, "Standard equipment," is there not?

A. Yes, sir.

Q. And at the bottom of that list there is a little asterisk?

A. Yes.

Q. And it says, "Not included as standard equipment with Open Press." That is that mark?

A. Yes, sir.

Q. And then we say, "One set cast rollers. No charge - for Erector's convenience."

MR. CALL: Let me make my objection to this on the ground he's reading the part that talks about a new Kluge automatic platen press, and the front talks about a new Kluge platen press.

MR. MANN: But the notation was about an open press. I'm not talking about an open press.

(Argument off the record)

MR. CALL: I object to that. May I point out to the court we have from the first witness, "That the vendor hereby agrees to sell to the vendee," not a Kluge automatic platen press, but one twelve by eighteen Kluge platen press.

MR. MANN: Yes, open.

MR. CALL: On the back it refers to an automatic platen press, something different from what was agreed to be bought.

THE COURT: I'll let him cross examine.

MR. CALL: I object to it on that ground.

THE COURT: Overruled.

Q. The reference I had with the asterisk it the notation, "Not included as standard equipment with open press." Is that corect?

A. Yes, sir.

Q. And what you bought was an open press?

A. Yes, sir.

Q. And the notation with the asterisk is one set of cast rollers, no charge, for erector's convenience?

A. Yes, sir.

Q. What did it indicate to you? I'll put it that way.

A. What that indicates and what we were led to believe - - -

Q. No, what does it indicate to you?

MR. CALL: Ask her if it indicated anything to her. I object to it on the ground it calls for a conclusion.

THE COURT: Overruled.

Q. Go ahead.

A. Can I answer by saying that part of the - - I mean, all we paid any attention to was the front side of the contract in signing it.

Q. You didn't read the whole contract?

A. No, sir.

Q. Do you know you are charged with everything there?

A. Yes.

The plaintiff makes two different types of open presses as stated by Anton Petersen, a professional erector of the plaintiff (R.206).

Q. Do open presses come in made up with a variation in the number of rollers?

A. Yes.

Q. And what variation of rollers in the presses that Kluge makes do you have?

A. Trey make a four roller and a six roller."

So that in the very first instant when the contract was executed by the defendants, they purchased on the 18th of October, 1951, an open press 12 x 18 of the six roller type, and that said purchase did not include cast rollers. Even though they signed the agrement on the 18th day of October, 1951,, the agreement provided, and they so understood, that it had to be accepted by the home office and they received notice of acceptance as shown by their Exhibit D-5 under date of October 25, and in that notice it again recites:

"A copy of the contract, containing the entire agreement of the parties, is enclosed."

Some time after the execution of the original contract the salesman and the defendants got together. Just why, cannot be determined from the record unless the statement of Jean Shonka on cross examination (R.128) might show:

"A. When we signed the contract and paid him fifty dollars at our home on September 18, he informed us that the machine. an erector would set up this machine, it would be in complete running order and he would come and show us how to print and run two or three jobs for us.

Q. After he told you that you signed the contract that said it contained all of the statements between you and him. or as far as the agreement was concerned?

A. We signed the contract.

Q. Which reduced to writing all your understandings?

A. Technically, yes.

Q. Now, is there anything in this contract that says he has to furnish you with the six rollers?

A. No, but it says there will be an erector to erect the machine.

Q. Now, I go back to this exhibit number two. That has your signature on it?

A. Yes, sir.

Q. Now, this says, "Mr. Raymond has consented to assist us in our initial training inasmuch as we have had no letter press experience whatever." There was nothing in the contract that required Mr. Raymond to assist you in your training, was there?

A. No.

Q. Then you signed this letter of November 16 to Brandtjen and Kluge saying that because Mr. Raymond would assist you, that you would waive the responsibility of them installing your machine?

A. We didn't waive - -

MR. CALL: Just a minute. I object to that because you don't state what that release says.

(Argument off the record)

MR. MANN: Let the record show she's got it in her hands looking at it.

A. Will you read the question, please?

(The last question was read by the reporter).

A. We released them from that portion of the contract that stated a competent man to install the said equipment to be furnished by vendor, his expenses, while engaged, to be borne by the seller."

As a consequence of some understanding between the defendants and the agent who sold the machine the court

allowed the defendants to introduce Exhibit D-6 to explain plaintiff's Exhibit P-2, yet no pleading was ever made that the original contract was modified by any subsequent agreement insofar as the defendants were concerned, the plaintiff pleading however, that they were released by the defendants from performing that part that required them to send an erector to install the machine.

Now when the machine is shipped and the conditional sales contract and note is made up and sent to be signed, it became necessary to again describe the press. At this time the stenographer is filling in the description said:

> "1 12 x 18 Kluge Platen Printing Press with 6 rollers and all standard equipment" (Ex. P-3)
> The original contract description (Ex. P-1) was:
>
> "1 12 x 18 New Kluge Platen Press 6 roller including the equipment as listed on back hereof, including the Warranty there set forth."

and on the back it specifically provides that no cast rollers are included.

They admit in their testimony that no cast rollers were included in the original contract. They admit they waived the installation and now use these two items to ask for the privilege of rescinding the contract.

POINT NO. 6 A Breach, if any was committed by plaintiff. was slight. Equity should therefore deny rescission.

Rescission. a creation of equity, has always been deemed an extreme remedy. It will not be granted for every breach of contract. Kampman et al vs. McInerney, 1951 —Wis— 432, 46 N.W.2d 205. In that case, plaintiffs sold tavern fixtures under the Uniform Sales Act. There was a delay in performance and defendants attempted to rescind. The court found time was not the essence so there was no basis for rescission (N. W. 2d 207;

"A contract may not be rescinded for every breach thereof. **A breach of contract not so substantial as to defeat the object of the parties in making the contract** does not entitle the other party to rescind." (Dark print added).

In accord: Vincent vs. Palmer, 1941, —MD—, 19 A 2d 183, 188:

"A court, however, will not grant a rescission for casual or unimportant breaches, but only for a substantial breach tending to defeat the object of the contract."

Where the defect can be remedied by an award for money damages, rescission will not be granted: Johnson vs. Meiers, 1946,—Mont—,164 Pac 2d 1012. There, plaintiff and defendants had agreed to share the use of a building, including the use of the furnace, hallways, stairway,etc., In the suit, defendants had counterclaimed for rescission, alleging that plaintiff had destroyed the heating plant. Defendants had to pay $700 to have it replaced. The court ruled that the breach was not substantial, citing 12 Amer. Juris., Contracts, Section 440 at (Pac 2d 1014):

"A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated for in damages does not warrant a rescission of the contract."

Applying the law to the facts, the court continued (Pac 2d 1014):

"The main purpose of the contract was to construct one building on the three parcels of land wherein the parties would have the use of the hallways and stairway. The matter of heating the building was incidental and subordinate to the main purpose which was to have but one building."

In accord: LaBar vs. Lindstrom, 1924, —Minn—, 197 N. W. 756, in which plaintiff contracted to buy a house which defendants represented as being "first class." The price was $17,000. Plaintiff attempted to rescind the contract because the roof sagged and leaked. The court found that by an expenditure of $275 the house could be placed

in the condition it was represented to be by defndants. On appeal, the court decided that rescission was not proper, and plaintiff was awarded his damages (N.W. 756):

> "Plaintiff can be fully compensated in damages for correcting the fault in the roof **and when this is done he will have all that he bargained for** and in the condition in which it was represented to be." (Dark print added).

Also, see: United States vs. Haynes School Dist. No. 8, (U.S.D.C., E.D., Ark., 1951) 102 Fed. Supp 843, 849; I Black on rescission, Section 198 pp. 553, 554; 17 C.J.S., Contracts Section 422, p. 906.

In recognizing that parties should attempt to reconcile their difficulties rather than abandon their agreements, 6 R.C.L., Section 311 has also supported the rule at page 926:

> "It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon that contract at once. In order to justify an abandonment of it and of the proper remedy growing out of it, the failure of the opposite party must be a total one, - - - the object of the contract must be defeated or rendered unattainable by his misconduct or default."

Utah has recognized and followed the rule in Sidney Stevens Implement Co. vs. Hintze, 1937, 92 Utah 264, 277, 278, 67 Pac 2d 632, 638, 111 ALR 331, 339, 340.

Defendants have sought rescission because there were allegedly no cast rollers with the press and no completion of the installation. Although plaintiff has argued that full performance occured, assuming there were such a failure plaintiff still maintains that there was no substantial breach of contract which would warrant a rescission. First, defendants could have had their rollers cast at a very slight expense by sending them to the roller company in Salt Lake City, Utah, the cost being about $26.00. That

expenditure equalled less than 2% of the value of the machine, and it seems difficult to understand why defendants did not incur it rather than to seek to abandon their contract immediately. The situation is similar to that displayed in LaBar vs. Lindstrom 1924, —Minn—, 197 N.W. 756 supra p. 13, for once the expenditure was incurred, defendants would have had exactly the equipment they believed themselves entitled to. Since the rollers are soft material, likely to wear after use, defendants would probably replace them again and again during the time they would have operated the press in their printing business. Therefore it is not an unusual measure to take to place or maintain the equipment in working condition.

In regard to installation, it was shown that Mr. Raymond completely assembled the machine except for the rollers which defendants were to have cast. The electrical connection was not made, because the original contract provided for the purchaser to perform that job. Defendants also complained that the press was not bolted to the floor, but they admitted at the trial that they had not procured any permission from their landlord to bolt the plaintiff's press to the floor. Futhermore, they never operated the press to determine whether such an attachment was necessary. In fact, when the defendants decided to abandon their contract, they did not have the press connected or the rollers cast, or attempt to operate it in any way. Actually, there was no basis on which they could object to its operation, and there was no evidence that their demand for rescission occured as a result of the manner in which the press operated.

POINT NO. 7.: That the court erred in not finding in favor of the plaintiff and against the defendants.

CONCLUSION

As a summary of all of the evidence before the court and as a conclusion and in addition as argument on the point above, we have this main proposition. That the contract (Ex. P-1) was for the sale of an open press without cast rollers, to be delivered at a future date and to be installed by the plaintiff. That (Ex.P-2) released the plaintiff from said installation. That the conditional Sales Contract made and entered for the purpose of securing the purchase price of the original contract of October 18 (Ex. P-3) did not increase the property that was purchased on October 18 because of the typographical error which said "with six rollers" when it should have been "six roller". That the plaintiff, at its own expense and on the 5th and 6th of April, completely installed said machine as contemplated by the original contract. That the roller cores that were placed on said machine could have been cast by the defendants for an item of $26.00 and according to their own witness Mr. Claybaugh (R.194) that with the exception of the cast rollers and the electrical connections which the defendants had to do themselves, the machine could have been operated.

As a consequence, the defendants received everything they bargained for but evidently decided that they would be better off if they could force a rescission and buy a used machine than to continue to make the payments. The used machine cost $600.00. (Ex. D-19) and was finally purchased May 9 and like the Judge said when he made his decision (R. 236) that the defendants:

> "Began flirting with another company for the installation of another machine. It's just nip and tuck as to whether your clients were negotiating with another company before the mechanic got there to install the first machine, or not."

That the great weight of the evidence being entirely against the defendants and in favor of the plaintiff and this being an equitable case, and this court having a right to review said evidence and the lower court having granted damage out of the same transaction that it has rescinded which is contrary to law, this court should therefore reverse the lower court and find in favor of the plaintiff and against the defendants in its entirety, or if not in its entirety, then that part of said judgement granting damages to the defendants for the freight paid to a third party should be stricken from the judgement granted by the lower court and plaintiff be granted his costs herein.

Respectfully submitted,
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